United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL

74-2626

To be argued by
MICHAEL J. RYAN

United States Court of Appeals
FOR THE SECOND CIRCUIT

JORDAN INTERNATIONAL COMPANY,

Plaintiff-Appellant,

against

S.S. PIRAN, her engines, boilers, etc.,

and against

FEDERAL COMMERCE & NAVIGATION CO., LTD. and SPLOSNA PLOVBA,

Defendants-Appellees.

(69 Civ. 284)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANT-APPELLEE, SPLOSNA PLOVBA

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Counter-Statement of Issues Presented

Was the District Court's decision that defendants had carried the burden of proving a peril of the sea and a seaworthy vessel, and alternatively, due diligence to make the vessel seaworthy, supported by the evidence?

Counter-Statement of the Case

The essential facts are set forth in the decision of the Court below (A3-A15).*

The M.V. PIRAN carried a cargo of steel coils from Newport to the United States (A4).

During the course of trial, a claim with respect to damage to cargo discharged at New Orleans was withdrawn (TM 154, 155)** and the trial continued with respect to cargo stowed in the lower hold of No. 1 hatch of the M.V. PIRAN (A4).

Appellee, Splosna Plovba, was the owner of the M.V. PIRAN (A5).

At approximately 0630 hours on the morning of February 9, 1968, damage to the No. 1 hatch was discovered (A6). The No. 6 pontoon of hatch No. 1 was buckled in and about its center and had fallen part way into the hatch. The No. 5 pontoon was also damaged, but still in place (A7).

The District Court found that the damage to the No. 6 pontoon and also to the No. 5 pontoon occurred solely from extraordinary wave action which produced a sudden or almost sudden or instantaneous fall of a great weight of sea water upon the pontoon (A9).

The Court found and concluded that defendants had rebutted any presumption of unseaworthiness and proved their case to be within the perils of the sea exception under the United States Carriage of Goods by Sea Act (A6/7, 13).

The Court further found the buckled pontoon to be seaworthy (A13) and went further to find and conclude that

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* A refers to Appendix followed by page number.
** TM refers to trial minutes.

defendants proved the exercise of due diligence with respect to the pontoons in question at and before the voyage (A15).

The District Court dismissed the complaints of Jordan International Company and Eastern Steel and Metal Company (A15). Jordan International Company appeals from the decision of the District Court. The appeal noticed on behalf of Eastern Steel and Metal Company has been withdrawn.

POINT I

The decision of the Court below is correct and supported by the evidence.

Appellant does not question the law as applied by the District Court which stated:

> "Defendants claim that the entry of the water was not caused by unseaworthiness, but by a peril of the sea for which defendants are not liable under COGSA. Defendants have the burden of proving this proposition.
>
> If defendants do not prove the above and do not rebut the presumption that the loss was caused in whole or in part from unseaworthiness, they still may be exonerated if they can show due diligence before and at the beginning of the voyage to make the vessel seaworthy." (A6/7).

The District Court found that the damage to the No. 6 pontoon and also to the No. 5 pontoon occurred solely from extraordinary wave action which produced a sudden or almost sudden or instantaneous fall of a great weight of sea water upon the pontoon (A9) and that this was a situation where an extraordinary wave action greater than could be anticipated even in North Atlantic winter weather fell on a sound and seaworthy pontoon (A13).

In *Philippine Sugar Centrals Agency* v. *Kokusai Kisen Kabushiki Kaisha* (2nd Cir., 1939), 106 F. 2d 32, this Court considered a "peril of the sea" defense where the wind force on the beaufort scale did not exceed 10.

Judge Learned Hand, speaking for the Court, noted the structural damage incurred by the vessel and commented:

> "We need not resort to the somewhat rhetorical description of this storm by the officers to believe that it was one of unusual severity. True, it was no more than was to be expected in those waters at that time; but in some waters in some seasons, even hurricanes are not infrequent. Although this was not a hurricane, it was bad enough to damage the gear and superstructure of a seaworthy ship. The phrase, 'perils of the sea', has at times been treated as though its meaning were esoteric: Judge Hough's vivid language in The Rosalia, 2 Cir., 264 F. 285, 288, has perhaps given currency to the notation. That meant nothing more, however, than that the weather encountered must be too much for a well-found vessel to withstand. Duche v. Brocklebank, 2 Cir., 40 F. 2d 418. The standard of seaworthiness, like so many other legal standards, must always be uncertain, for the law cannot fix in advance those precautions in hull and gear which will be necessary to meet the manifold dangers of the sea. That Judge Hough meant no more than this in The Rosalia, supra, is shown by his reference to the definition in The Warren Adams, 2 Cir. 74 F. 413, 415, as the equivalent of what he said. That definition was as follows: 'Tha term may be defined as denoting "all marine casualties resulting from the violent action of the elements, as distinguished from their natural, silent influence".' It would be too much to hope that The Rosalia, supra, will not continue to be cited for more than this, but it would be gratifying if it were not." (At Pages 34,).

More recently, this Court in *J. Gerber & Company* v. *S.S. Sabine Howaldt* (2nd Cir., 1971), 437 F. 2d 580, quoted the foregoing passage with approval and stated further:

> "The standard of seaworthiness must remain uncertain because of the imponderables of the forces exerted upon a ship by the winds and seas. Ship design and construction over many centuries of experience have evolved to meet the dangers inherent in violent winds and tempestuous seas. But for the purpose of deciding whether or not they constitute perils of the sea for a particular vessel for the purpose of the statutory exemption there is the question of how violent and how tempestuous. *These are matters of degree and not amenable to precise definition.* Moreover, there are variations in kinds both in the winds and seas: whether the winds are steady for a number of hours from one direction or are in frequent gusts lasting less than a minute on each occasion or are cyclonic and shifting. The seas may proceed in a fairly regular procession of coamers or consist of turbulent cross-seas which can be very destructive. In a constricted sea-way the drift and set of currents and their relationship to the velocity and direction of the wind are matters to be considered."

and further:

> "Other indicia are, assuming a seaworthy ship, the nature and extent of the damage to the ship itself, whether or not the ship was buffeted by cross-seas which wrenched and wracked the hull and set up unusual stresses in it and like factors.
>
> While the seaworthiness of a ship presupposes that she is designed, built and equipped to stand up under reasonably expectable conditions this means no more than the usual bad weather which is normal for a par-

> ticular sea area at a particular time. It does not, however, include an unusual combination of the destructive forces of wind and sea which a skilled and experienced ship's master would not expect and which the ship encountered as a stroke of bad luck." (At Page 596; emphasis supplied).

Appellant, for obvious reasons, criticizes the testimony of Captain Richard Patterson, a former naval and merchant marine officer with great experience in North Atlantic shipping (A9; A51/52) who also did extensive work for the United States Weather Service (A52) and was familiar with the weather charts published by the United States Department of Commerce (A52; Exhibit L).

Captain Patterson plotted the positions of the PIRAN on the weather charts prepared by the United States Department of Commerce (Exhibit L) and made transparent overlays of the vessel's position for each chart (during the relevant period involved (A53/54). Captain Patterson's analysis of the weather charts showed that the vessel would be encountering cross-swells in the southerly edge of the center of the storm (A55/57) and described the peaking condition which would occur when two waves met together throwing a heavy mass of water into the air (A57/58; Exhibit M, Patterson Notes; A12/13).

The weather charts were prepared from numerous vessel reports, although only selected reportings would be noted on the charts (A66/68). While appellant would imply that there was no ship closer to the PIRAN than 100 miles away, such assertion disregards the clear testimony of Captain Patterson as to how the charts are prepared and from what information and reports. The charts are prepared from numerous reports, but show only a limited selected number of reporting vessels because of space restriction (A66/69).

While no evidence to the contrary was offered to the Court below, appellant now seeks to denigrate the objec-

tive evidence of the weather charts (Exhibit L), the weather reports (Exhibit K) and Captain Patterson's analysis and testimony. Appellant seems to decry the fact that it was not faced with a "parade of ship's officers telling about the worst storm in their long careers" (Appellant Brief, Page 9), rather than the objective evidence presented to the Court. Indeed, appellee must seriously question whether appellant would have been satisfied with such a "parade".

Appellant's criticism is not well taken. The damage to the No. 1 hatch pontoons was discovered at about first light on the morning of February 9, 1968 (A6). The vessel was in its most hazardous position at approximately 0100 hours of February 9th (A59). The M.V. PIRAN is a 6-hold cargo vessel with its bridge aft (Exhibit G, General Arrangement Plan). Between the bridge and the forecastle there are 6 hatches and 3 masthouses (Exhibit G, General Arrangement Plan). The No. 1 hatch could not be seen from the bridge, even in daylight (A28).

Considering the lack of visibility during hours of darkness, the pitching and rolling of the vessel as well as the No. 1 hatch being some 300 feet forward of the bridge, the absence of any eyewitness testimony is totally understandable and certainly not conclusive (A12). What appellant chooses to overlook is the significant and impressive structural damage suffered by the M.V. PIRAN (A13, 15).

Appellant's brief is silent as to the significant structural damage to the main deck, the port longitudinal hatch beam along with 6 deckhead beams (A106/107; 149). This significant structural damage was noted by surveyor James F. Lindsay when he examined the vessel at Bridgeport on February 13, 1968. Mr. Lindsay, an experienced hull surveyor (A103/105) found, in addition to the damage to the No. 5 and No. 6 pontoons of hatch No. 1, the

forward bulkhead of the masthouse aft of No. 1 hatch heavily set in between its frames (A106; 149; E10);*** inboard pipe stanchions to the winch platform of the No. 1 masthouse fractured at their welded connection (A149; Exhibit Q, Page 21; Exhibits H-7, 8; E9); The main deck set down on the port side of No. 1 hatch in line with the forward bulkhead of the No. 1 masthouse (A106; 149) and also noted the port longitudinal hatch beam and 6 deckhead beams distorted and set down (A106/107; 149; E11, 12).

Edward Ganly, a surveyor of considerable experience (A35/36; 42/43), in referring to the damage to the main deck, the hatch beam and deckhead beams characterized this as "serious hull damage" (A46/47). Ganly also reviewed photographs of the damage to the longitudinal girder of the hatch side (A47/48, E11) and photographs of the damaged pontoons (E6, 7; A49/50). It was Ganly's opinion that the damage to the PIRAN was caused by "taking on board a rather staggering amount of green water, very heavy ocean waves coming on board the ship" (A50).

Likewise, Captain Patterson, also noted the distortion in Exhibits H-12, 13 (E11, 12; A69/70) and was also of the opinion that it would take an enormous amount of weight to buckle the pontoons (A71) and that the type of indentation occurring regularly over a relatively large area in the center would be of the type of damage caused by sea water rather than by anything else (A9, 71).

In spite of this evidence, appellant would seek to limit the damages suffered by the PIRAN to "minor damages" (Appellant's Brief, Page 15). Other statements on this page of appellant's brief call for some small comment: appellant states "Captain Patterson, defendants' expert, *referred* to that entry (TM 410)."

*** E refers to Exhibit Volume followed by page number.

A review of Page 410 of the trial minutes clearly shows that the entry referring to "minor damages" was not referred to by Captain Patterson, but rather by counsel for appellant.

Appellant's brief goes on to quote a comment of the Court at the top of Page 15. It is respectfully submitted that the quotation is misleading and taken out of context.

Appellant chooses to disregard the testimony of Mr. Ganly concerning the very same photographs:

> "It is easier to tell it really from underneath. And if you want to photograph it, then you have to go on the top and lay a straight edge across the top, with some sort of measuring device in the deepest part of the indent. O herwise it won't show in the photograph." (A48).

Mr. Ganly further testified with respect to Exhibit H-12 (E11):

> "Here is the damage on the longitudinal girder of the hatch side. One can see a misalignment in the bottom flange of that girder. It should be perfectly straight. One can see also that these deck beams are set down, they are curved down; which should be straight." (A48).

Captain Patterson also viewed Exhibit H-12 (E11). The Court asked:

> "Does that look to you like deformation of some kind?"

Captain Patterson replied in the affirmative (A69/70).

The testimony and survey report of James F. Lindsay also confirms damage to the deck and the strengthening members underneath (A106/107; 149).

Appellant's attempt to minimize to this Court the extent of structural damage suffered by the M.V. PIRAN is

without substance and contrary to the evidence submitted to and relied upon by the Court below (A15).

The District Court's decision was more than amply supported by the evidence presented to it. In this Circuit, the Courts have "unequivocally rejected the view that circumstantial evidence is probatively inferior to direct evidence and that its sufficiency is, therefore, to be determined by a different, more stringent test than is applied to direct proof" *United States* v. *Brown* (2 Circuit, 1956) 236 F. 2d 403 at 405. See also *Universe Tankships* v. *Pyrate Tank Cleaners* (SDNY, 1957) 152 F.Supp. 903 at Page 920.

> "* * * direct evidence of a fact is not required. Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence." *Michalic* v. *Cleveland Tankers, Inc.* 364 U.S. 325 at 330 (1960).
>
> "* * * even purely circumstantial evidence may properly be found to outweigh conflicting direct testimony." *United States* v. *Ebinger* (2 Circuit, 1967) 386 F. 2d 557 at 560.

The nature and extent of structural damage to the vessel have been recognized by the Courts as indicative of the existence of a "peril of the sea" *J. Gerber & Company* v. *S.S. Sabine Howaldt, supra.*

In *The Wildwood,* 133 F. 2d 765, the Second Circuit (reversing the District Court) considered structural damage to the vessel where the No. 1 hatch coverings were damaged, the door to the saloon ally was smashed and guard plates for steam pipes on the side of the No. 3 hatch were broken off and found a peril of the sea to exist.

See also *Duche* v. *Thomas & John Brocklebank, Limited* (2 Circuit, 1930), 40 F. 2d 418. See also *Davison Chemical Co.* v. *Eastern Transp. Co.* (4th Circuit, 1929), 30 F. 2d 862.

Nor did the Master expect seas strong enough to damage the No. 1 hatch pontoons (A108, A109).

The District Court found the vessel was seaworthy and that defendants carried their burden of proving due diligence at and before the voyage in question (A13/14).

Immediately prior to the voyage in question, the M.V. PIRAN was drydocked in Rotterdam for extensive repairs and inspections (Exhibit Y, Page 3; Exhibit Z). During that time, she was inspected by a senior Lloyd's surveyor, Leendert Olivier Jonker who surveyed the vessel 15 times between the period 28 December, 1967 to 17 January, 1968 (A76). Mr. Jonker examined from 150 to 250 vessels annually (A76) and, in conjunction with his inspection of the PIRAN made an inspection of the hatches, coamings and stiffening members, the hatch covers, the tarpaulins, wedges, battens, and everything further required for properly closing the hatches. He found them all in good condition (Exhibit W, Page 4). Based on his examination, he recommended the issuance of a new loadline certificate (Exhibit W, Page 4; A151/156; 157/158).

Mr. Jonker also testified live at the trial of this action as to his usual practice as far as inspecting hatch covers (A77/84). The District Court specifically referred to this testimony and gave credit and weight to it (A11).

In spite of this, appellant sets forth selected extracts from Mr. Jonker's testimony (A84/86) as indicative of a lack of knowledge on the part of the witness. Curiously, appellant does not quote Mr. Jonker's testimony at Page 536 where he states he would check the closing devices of the hatch by examining the pontoon hatch covers themselves, either in place or ashore or on the deck and have them turned around by crane. Mr. Jonker specifically testified he had to see them in place as well (A86).

The quotation set forth by appellant at Page 19 as support for the assertion that the District Court "poorly re-

ceived'' Mr. Jonker's testimony is rendered completely out of context. Not only is it contrary to the District Court's decision (A11), the statement quoted is from Page 276 of the trial minutes. Mr. Jonker's deposition (Exhibit W) was not received in evidence until the next day of trial (TM 436) and Mr. Jonker testified live on the next trial date following that (A75).

Upon sailing from Rotterdam on January 17, 1968, the PIRAN proceeded to Newport, Wales where she arrived on January 20th (A10). She loaded cargo at that port and sailed for the United States on January 31, 1968 (A4).

The boatswain, Rogelja Svonko, testified that his duties included the following:

> ''That before departure of the vessel to check whether all the hatches are properly closed and secured, that I check all the items on the deck, not only on the deck but also in other compartments whether it is tied and secured properly. That is basically it.'' (A111).

He also testified he not only checked the fender stowed aft of No. 1 hatch but also checked all the other items on deck (A111). He checked the fender and its lashing when the vessel sailed from Newport and from Rotterdam (A112). He also checked ''everything else'' (A112). He found that the fender was properly secured when the vessel left Newport (A112).

In addition to the testimony of the boatswain, the Master testified there were no accidents on shipboard during loading at Newport and the ship was in good condition when she sailed (Exhibit AB, 89). The stevedoring cargo superintendent at Newport did not recall any unusual incidents in the loading of the PIRAN (A87). With respect to the loading at Newport, a damage certificate was prepared by the Master with respect to damages caused by stevedores during loading. The damage certificate is limited to

damages incurred in the *lower holds* and makes no mention of any damaged pontoons (A159/161).

In the case of *J. Gerber & Co.* v. *S.S. Sabine Howaldt, supra,* this Court found the *Sabine Howaldt* to be seaworthy. The Court considered testimony as to a loadline examination of the vessel in April of 1965, some 8 months prior to the voyage involved in that case.

The case of *Peter Paul, Inc.* v. *Rederi A/B Pulp* (2nd Circuit, 1958), 258 F.2d 901, is of significance. This Court considered a fracture on a vessel which resulted in her splitting in two. The Court stated:

> "In our opinion it is not necessary and virtually impossible to state with any degree of certainty what actually caused the fracture.
>
> On this phase of the case, all the shipowner need establish is that normal precautions were taken to see that a discoverable notch did not exist. Appellants rely on the fact that there is no affirmative proof that such a defect was not present when the ship left Yokohama. However, if positive evidence were required to establish a negative proposition of fact (here absence of a discoverable defect), no carrier could ever discharge its statutory burden of proof. A month prior to the fracture a third-party, Lloyd's ship surveyor at the Hong Kong drydock, inspected the shell and found it to be in good condition. This party was qualified to make the inspection and the inspection was made in the regular course of his business. Unless there is some evidence of bias, incompetence or fraud, the report (Ex. NN) must be accepted at its face value. Appellants have stipulated that the Hong Kong surveyor would have testified in accordance with this report (Exh. A)." At Page 905.

See also *Margarine Verkaufsunion Gmbh* v. *M.T. G.C. Brovig* (S.D.N.Y., 1970), 318 F. Supp. 977, where Judge

Weinfeld commented on the annual inspection of the vessel concerned in that case:

> "In September, 1963, nine months before the voyage in suit, the Brovig was docked for her annual required inspection at Antwerp. A Lloyd's surveyor inspected the vessel's sides, decks, bottom and rudder. He performed the usual tests for hull seaworthiness, making a *visual examination* of all plates to see if they were corroded, fractured or had leaking rivets, and hammer tested those plates that showed signs of corrosion, which did not include the No. 5 port wing tank. In terms of his experience, which was considerable and impressive, the Lloyd's surveyor was of the view that the tests supplied were adequate to reveal whether or not anything was wrong with the plates; that in fact they were in good condition; and that the vessel was seaworthy. Lloyd's based upon the surveyor's recommendation, continued the Brovig in class and issued the appropriate certificate. The ship's Master, who was present during the inspection, was also of the view that the ship was 'completely seaworthy'. The examination and testing of the vessel by Lloyd's competent and experienced surveyor constituted due diligence to make the vessel seaworthy and her tanks seaworthy, and nothing that occurred thereafter until the time she set sail from Houston and New Orleans requires any different finding." At Page 981. (emphasis supplied)

The District Court in this case had more than sufficient evidence to support its finding that the M.V. PIRAN was seaworthy and that appellant exercised due diligence to make the vessel seaworthy. See also *The Floridian* (2nd Circuit, 1936), 83 F. 2d 949; *Balfour, Guthrie & Co., Limited* v. *American-West African Line, Inc.* (2nd Circuit, 1943), 136 F. 2d 320.

The District Court reviewed the evidence presented to it and was impressed by the physical evidence of the damaged pontoons as shown by the photographs taken in Bridgeport (A11; E6, 7) and by the significant damage to the deck and supporting deck girders in the No. 1 hatch area (A15).

Appellant chooses to disregard this significant evidence as well as the other evidence presented to and relied upon by the Court below. Rather, appellant picks and chooses through the record for isolated points to bolster its assertions.

Appellant refers to the cover of the No. 6 pontoon (which was tested) as being "only 32-hundredths of an inch thick" (the top plate tested was actually .335 inches thick) (Exhibit S) and, although the test made at the discretion of the surveyor Captain Nesser (A72/73) was not of a strength member of the pontoon, the pontoon top plate was heavier than required by Lloyd's Register at the time of the casualty (TM 354).

As to testing, although plaintiff-appellant saw fit to take the depositions of the Master, chief engineer and chief officer aboard the vessel at Bridgeport on February 13, 1968 (Exhibit AB), no request was ever made for production or the opportunity to conduct tests by plaintiff. Indeed, the matter was never raised by plaintiff until well over discovery had been completed and a note of issue attesting to the readiness of the case for trial had been filed by plaintiff-appellant. Curiously, the testing which appellant criticizes was done by the very same laboratory, Pittsburgh Testing Laboratory, which appellant employed to conduct an outturn survey and chloride analysis of appellant's cargo discharged at New Orleans. This aspect of the case was withdrawn by appellant on the second day of trial (TM 154, 155) and therefore, depositions of the Pittsburgh Testing Laboratory personnel were not submitted.

Appellant implies that the trial judge refused to receive any evidence concerning testing of wire which secured a fender stowed aft of No. 1 hatch (Appellant's Brief, Page 24). This implication is inaccurate. Evidence as to testing of the wire was not introduced to show anything about the actual strength or weakness of the wire, but merely to show what happened to it (A45, 46).

Indeed, any evidence of the strength or weakness of the wire would be superfluous.

The boatswain testified that the fender was tied on both ends; that it was tied on each end and that the bridle was secured through the web of the hatch (A111). The wire on each side was secured from an eye of the fender to a U-type clip welded to the deck (Exhibit AC, Page 11). The boatswain had checked the securing of this fender when the vessel sailed from Newport as well as from Rotterdam (A112).

After the vessel encountered the storm, the boatswain checked the fender and its lashings (A112). He found the thinner wire on the starboard side of the fender broken; however, the bridle was intact and the wire securing the port side of the fender was unbroken and intact (A112).

The fender was stowed aft of the No. 1 hatch when the boatswain joined the vessel in Rotterdam (A111). The fender was never used or moved (A113).

The damage to the No. 6 pontoon was in the center (E6) and the damage to the aft coaming of No. 1 hatch was at the center line as testified to by appellant's own expert, Watkins (A91/93).

The fender was stowed to the port of the center line (A7; E1).

It is clear that the fender, still secured by the wire on its port side could not have moved to the right or star-

board so as to cause the damage to the coaming and pontoon as appellant theorizes.

Appellant puts great stress on the inspection made by Mr. Watkins who was on board the PIRAN in Bridgeport on February 13, 1968 (disregarding completely the findings of surveyor James F. Lindsay who was on board the PIRAN the very same day). Appellant's reliance on Mr. Watkins' "conclusions" is not well placed.

Although Mr. Watkins was on board the PIRAN at Bridgeport, he did not go into the 'tween deck or below deck (A90). He did not recall being present at depositions aboard the vessel (A90), although he was in attendance (Exhibit AB).

While Mr. Watkins did go on the forecastle of the vessel, he did not observe any damage there (A90/91). The Court's attention is simply called to Exhibits H-2, 3, 4 as identified by surveyor Lindsay (Exhibit Q, Pages 18, 19).

In examining the fender, Watkins merely walked around it (A92). It was his opinion that the fender not only hit the after end of the coaming but "was on top of the hatch cover itself and pounding down on it" (A93). While Watkins was of the opinion that this occurred as to pontoon No. 6, somewhat realistically, this was not his opinion with respect to pontoon No. 5 (A93).

Appellant overlooks this testimony, indeed abandons its expert's opinion that the fender was pounding down on the hatch, and now asserts that the fender struck the coaming, somehow causing the pontoon to buckle downward into the 'tween deck. The Court below specifically considered this theory and, quite rightly, rejected it (A8/9).

The total clearance between pontoons in the No. 1 hatch, fore and aft, was 30 millimeters (A50). According to Watkins' measurements, the after hatch coaming was pushed forward approximately 3½ inches at the point of greatest deformation at the center line (A8).

With only a total of 30 millimeters clearance fore and aft between pontoons in place, appellant's theory that the after coaming was pushed forward under some 3½ inches is implausible.

The deformations of the pontoons graphically shown by the photographs (E6, 7) clearly show a downward deflection, not a forward horizontal deflection.

It was also Watkins' opinion that damage to the steel support shelves at the after corners of the hatch would indicate that the damage involved would have been caused by force of water (A96). While Watkins stated he examined these shelves and found no damage, the enlargement of photograph No. 8 attached to Exhibit 2 (E2) shows damage to the aft starboard shelf support. This is further corroborated by Exhibit V-1 (E14) (taken by Captain Nesser in New Orleans) (A73). The latter photograph clearly shows the gouge in the support lip also depicted in the enlargement of photograph No. 8 attached to Exhibit 2. The significance of Exhibit 2 as regard Mr. Watkins' observations and opinion becomes clear when it is noted that photograph No. 8 was taken at 11 o'clock on February 12, the day before Mr. Watkins was on board the PIRAN at Bridgeport. This damage had to be present when Mr. Watkins made his inspection. Nor could this gouge be attributed to the discharge of cargo as discharging did not commence until 0800 hours on February 13, 1968 (Exhibit 2).

The damage to the shelf lip was present and although overlooked by appellant's expert (along with other damage on the forescastle), Mr. Watkins' own opinion would be that the damage to the pontoons was caused by a heavy fall of water (A96; A119; Exhibit 20).

As to appellant's other expert, Dr. Korman, essentially appellant recites his academic background and relies on this to carry his stated opinion that the pontoon was not damaged by the action of water.

Suffice it to say that Dr. Korman's calculations and opinion were nothing more than a sterile mathematical exercise, not based on relevant fact, and indeed incorrectly accomplished (A99/101; A37/42).

Throughout its brief, appellant quotes extensively from comments made by the trial judge during the course of trial (Pages 13, 14, 15, 19, 23, 24, 26 and 32). The inferences sought to be presented by these quotations are obvious; however, this Court is not well served by such argument. Not only does this argument completely disregard the clear and definite findings of the Court below, it also disregards the District Court's own explanation and admonition that nothing should be inferred from any of the District Court's comments during trial. Judge Griesa, prior to stating his findings and conclusions, said:

> "Now I'd like to put on the record my findings of fact and conclusions of law. We have had a great deal of discussion. We have had considerable briefing both before the trial and during the trial, and we have had discussions during the trial which have interrupted the evidence, and I think that none of us will know anything more about the case than we do now. At least I won't.
>
> The different problems and questions have been discussed, and I have stated my questions pro and con each side, and I have come to conclusions which I will now outline. To the extent that they may be, in whole or in part sometimes different from what I have stated during my probing and questioning, I can assure counsel that what I said before was an attempt to outline my problems and what I am stating now is my final judgment in the matter insofar as this trial is concerned after a review of the evidence as a whole." (Op. Page 2a)

It is abundantly clear that the decision of the Court below was correct in law and entirely supported by the evidence before it.

> "* * * the conclusion of the District Court judge will ordinarily stand unless the lower court 'manifests an incorrect conception of the applicable law.' In re Vessel Marine Sulphur Queen, 460 F. 2d 89 (2d Cir., 1972)." *Director General of India Supply Mission* v. *S.S. Maru* (2nd Circuit, 1972), 459 F. 2d 1370.

CONCLUSION

The decision of the Court below should be affirmed with costs to appellee.

Respectfully submitted,

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Attorneys for Defendant-Appellee,
Splosna Plovba
By MICHAEL J. RYAN

Of Counsel
MICHAEL J. RYAN

(58931)

Due and timely service of Two copies of the within Brief is hereby admitted this 10th day of November 1975.

.....

Attorneys for Appellee Federal Communications Commission

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